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In The

Supreme Court of the United States

October Term, 1993

ROBERT PATRICK GUIMONT, ET AL.,

Cross-Petitioners,

v.

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the nexus analysis of the takings issue set forth in *Nollan v. California Coastal Commission* apply to development exactions when the item demanded by government is not real property, but is money?

2. When the Washington Supreme Court has determined that levying a particular development fee (exaction of money) is an attempt to shift the economic burden of solving low-income housing needs onto a few individual property owners, and further has concluded that property owners are not significantly more responsible for this society-wide problem than the rest of the population, did the court err in nevertheless concluding that imposition of the fee does not constitute a taking without just compensation?

LIST OF PARTIES

Appellant before the Washington Supreme Court and Petitioner before this Court is the Director of the Department of Community Development, an agency of the State of Washington.

Respondents before the Washington Supreme Court and Respondents and Cross-Petitioners before this Court are: ROBERT PATRICK GUIMONT and WILLIAM PATRICK GUIMONT, dba National Trailer Park; WINIFRED ROOSENDAAL, dba Gables Motel; LARRY KLAAS, dba ISSAQUAH VILLAGE RV & MOBILE HOME PARK; RONALD SIMOSKY, KATHRYN ANDERSON and DARLENE YOUNG, dba Country Manor Mobile Home Park; FRANKLIN W. EVANS and JOANN S. EVANS, dba University Trailer Park; FRANCES SHOOK, dba Blockhouse Mobile Home Park; LES ROWLAND, dba Les Rowland Enterprises; KEITH MALCOM, dba Mill Village Mobile Home Park; CLIFFORD H. SANDS and NORMA N. SANDS, dba Sands Mobile Home Park; LONNEY FORD and MAX FORD, dba Royal Apartments and Mobile Park; ALVIN RICHARDSON and BONNY RICHARDSON, dba Riverside Mobile Park; ADA STRATTON, dba Spacette Mobile Court; WALLACE R. BARNETT, dba Olivia Park Trailer Court; STEPHEN J. KOLCSEY, dba Mobile Home Wonderland; BETTY MAE BERMAN, dba Central Valley Mobile Home Park; JOHN M. GRAHAM, dba North Bend Mobile Home Park; V.O. MANASCO, dba Manasco's Mobile Home Park; JOSEPH LEE and PENELOPE A. LEE, dba Linden Square; STAN DELONG and T.R. GILLESPIE, dba Camelot Square

LIST OF PARTIES – Continued

Mobile Home Park; HILDA W. WOTHE, dba Fall City Mobile Park; KARL GRASSE, dba Evergreen Mobile Home Park; JAMES CARRIERI and MELINDA CARRIERI, dba Brewster Motel; S. ANDERSON, dba Redmond Mobile Manor; ED COYLE, dba Harbor Mobile Estates; RONALD W. MYERS and DARYL W. NOYD, dba Cascadia Mobile Home Park; JOHN MASSMAN and SHIRLEY A. MASSMAN, dba Lone Cedar Mobile Home Park; MARVEL I. OLSEN, dba Laurelwood Park; JEAN E. EARL, dba Town Mobile Park; MICHAEL SPENCER and RUTH SPENCER, dba Red Gate Mobile Home Park; KINNEY H. LEONARD and IRENE R. FRAZIER, dba Bow Lake Trailer Town; LINDA LEE HUNTLEY, dba East Trent Mobile Home Park; WILLIAM STOTTS and LILLIAN STOTTS, dba Bill and Lil's Mobile Home Court; FRED DETERT and NONA DETERT, dba Brookside Mobile Park; REX BIRCHALL, dba Eastgate Mobile Home Park; MICHAEL J. LANG, dba Cedar Lane Park; KATHY BEGGS and VAN THOMAS, dba Alpine Estates Mobile Home Park; THOMAS L. THORNTON and NANCY K. THORNTON, dba Tyee Valley Mobile Home Park; FRANK K. ROSS, dba Ross Trailer Park; WILLIAM J. CARRUTH and CARL D. HANSON, dba Cedar Park; B. McKISSEN and H. McKISSEN, dba Liberty Village Mobile Home Park; ROBERT L. COLLOP, dba Angel Lake Mobile Home Park; BRUCE W. ROWE, dba Northwest Mobile Estates; PARTICIA SEVERSON, dba Leisure Manor Mobile Home Park; DOROTHY GRANT ELWAY, dba Carriage Club Estates; GLENN E. BROWN and SUSAN T. BROWN, dba Tyee Trailer Court; LESTER J. CHRISTOPH

LIST OF PARTIES – Continued

and IRENE J. CHRISTOPH, dba Hi-U Mobile Home Park; MARINA PANNI, dba Shady Glen; HENRY MILLER and RUTH MILLER, dba Loganberry Park, Mobile Home Park [sic]; WASHINGTON MANUFACTURED HOUSING ASSOCIATION; BEAR CREEK ASSOCIATES.

There is no parent or subsidiary company of a corporation to be listed.

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No. 93-927

In The

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October Term, 1993

ROBERT PATRICK GUIMONT, ET AL.,

Cross-Petitioners,

v.

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner is Bear Creek Associates, an intervening party in the original state court action. Cross-Petitioner respectfully urges that if the Court grants the Petition for Writ of Certiorari filed by the Washington Director of Community Development, that it also grant this Cross-Petition to enable the Court to address fully the relevant issues in this case.

I. OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 121 Wash. 2d 586, 854 P.2d 1 (1993), and is reproduced in the Petitioner's Appendix A. The Order denying Petitioner's timely motion for reconsideration is reproduced at Petitioner's Appendix C. The oral decision and order of the Superior Court for Thurston County, Washington, are unreported and are reproduced at Petitioner's Appendices D and E.

II. JURISDICTION

The decision of the Washington Supreme Court was entered on June 10, 1993. Petitioner's motion for reconsideration was denied on September 10, 1993. This Court has jurisdiction under 28 U.S.C. § 1257(a). A Petition for Writ of Certiorari was received by Cross-Petitioners on December 9, 1993, and this Cross-Petition is timely filed pursuant to Supreme Court Rule 12.3.

III. CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution, which provides in part:

> [N]or shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution, which provides in part:

> No state shall . . . deprive any person of life, liberty or property without due process of law . . .

The Mobile Home Relocation Assistance Act ("the Act"), Chapter 201, Laws of Washington, 1989, and amended in Chapter 171, Laws of Washington, 1990, which is reproduced at Petitioner's Appendices F and G.

IV. STATEMENT OF THE CASE

The Cross-Petitioner accepts and incorporates by reference the Counterstatement of Facts presented in Respondent's Opposition to the State's Petition.

V. REASONS FOR GRANTING THE CROSS-PETITION

I. Review of the Due Process Issue Raised in the Petition Cannot Be Complete Without a Review of the Takings Issue Raised in the Cross-Petition.

A. The Washington State Supreme Court Has Inextricably Linked Its Analysis Of Substantive Due Process Law With Its Pronouncements on Takings Law.

The case at bar, *Guimont v. Clarke*, is the most recent in a series of decisions[1] in which the Washington State

[1] *Orion Corp. v. State*, 109 Wash. 2d 621, 747 P.2d 1062 (1987) (*Orion* II), *cert. denied*, 486 U.S. 1022, 100 L.Ed 2d 227, 108 S.Ct. 1996 (1988); *Presbytery of Seattle v. King Cy.*, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911, 112 L.Ed.2d 238, 111 S.Ct.

Supreme Court has attempted to develop a set of rules for consideration of substantive due process and takings issues in the land use context. In setting forth its rules, the court in *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907 (1990) determined that one or both analyses might apply. The court set up a "threshold test" to establish whether a reviewing court should utilize a "takings" analysis or a due process analysis. See 787 P. 2d at 912.

The Washington court has recognized that its rules are designed to shift cases away from a takings analysis and move them into a due process analysis. In *Presbytery*, the court acknowledged that under its threshold inquiry, "many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a 'takings' formula." 787 P.2d at 914. The state court explained its concern that "choosing to invoke the takings analysis instead of the due process test" might trigger the specter of State financial liability and intimidation of the legislative body, "a situation about which we have previously expressed concern." *Presbytery*, 787 P.2d 907, n.20.

If this Court chooses to grant the state's Petition for Writ of Certiorari and to address Washington's application of substantive due process law in the land use context, the Court also should grant the Cross-Petition and address the takings issue. Because Washington's substantive due process and takings law have been developed

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284 (1990); *Robinson v. Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992); *Sintra, Inc. v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765 (1992); *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993).

together within the same cases, this Court could hardly consider Washington's due process rules without analyzing the "threshold inquiry" the Washington Supreme Court uses to determine which constitutional provision to apply.

B. Because the State Court Has Ruled That the Development Fee Is an Unfair Shifting of Public Burdens onto an Individual Property Owner, Either the Fee is "Unduly Oppressive" and Therefore Violates Substantive Due Process Guarantees, or the Unfair Shifting of Public burdens Violates the Takings Clause Principles Set Forth in Armstrong v. United States, 364 U.S. 40, 49, 41 L.Ed.2d 1554, 80 S.Ct. 1563 (1960).

Armstrong pointed out that the Just Compensation Clause of the Fifth Amendment is a barricade in the way of government action. It stands "to bar government from forcing some people alone to bear public burdens which should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

In *Guimont*, the Washington Supreme Court held the relocation fee was unduly oppressive because it involved a shifting of public burdens to individuals. *Guimont*, 854 P.2d 1 at 15. *Guimont* observed that "the state is placing the burden of solving housing problems on the shoulders of a few", when it is a "burden of society as a whole" *Id.* 16. If this Court grants review and rules that undue oppressiveness is not a criterion of substantive due process, this Court should then consider whether the same unfairness triggers Takings Clause protection. Of course,

prior Supreme Court precedent is clear that unfair shifting of social burdens onto property owners is precisely what the Takings Clause was intended to prevent. See e.g., *Armstrong; Penn Central Transportation Company v. New York,* 438 U.S. 104, 136, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978); *Nollan v. California Coastal Commission,* 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987); *Yee v. Escondido,* ___ U.S. ___, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992).

Review of the unduly oppressive standard necessarily is related to the unfairness principle of takings law. This Court, if certiorari is granted, should have the full opportunity to address both the due process and takings issues. Accordingly, this Cross-Petition which raises the takings issue should be granted if the petition is granted.

II. Washington Takings Law Regarding Exactions Is Hopelessly Confused And Directly At Odds With This Court's Precedent; This Court Has Clearly Indicated The Analysis To Be Utilized In Evaluating An Unconstitutional Exaction And The Washington Court Has Consistently Deviated From That Analysis.

Lucas v. South Carolina Coastal Commission, ___ U.S. ___, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992) confirms that regulatory takings analysis should begin with application of the two bright-line tests articulated in *Agins v. Tiburon,* 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980). *Lucas* states:

> As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests or *denies an owner economically viable use of his land.*'

Lucas, 120 L.Ed.2d at 815 (emphasis by Court) (quoting *Agins*, 447 U.S. at 260).

Lucas also explains that if neither of these two tests is violated, and thus the regulation does not constitute a "categorical" taking, the regulation still may cause a taking under the Court's *ad hoc* factual inquiry. *Lucas*, 120 L.Ed.2d at 815 n.8. The *ad hoc* inquiry focuses on "the economic impact of the regulation" and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* Significantly, there is no need to address these factors if a taking can first be found through either of the clear tests stated in *Agins* and *Lucas*.

Nollan v. California Coastal Comm'n, supra, applied the substantial advancement/nexus test to review whether an exaction requiring provision of a beachfront easement is a legitimate exercise of regulatory power. *Nollan*, 483 U.S. at 834 n.3. *Nollan* explained that the substantial advancement test reviews both the ends and means of the regulation. This Court, in *Nollan*, recognized that the Coastal Commission had a legitimate objective of providing greater public access along the beach and that acquisition of more access furthered it. The means of acquisition employed, however, were improper. *Nollan* observed that there was no basis for requiring the Nollans to contribute a beachfront easement because their proposed house did not impair existing rights of access. According to *Nollan*, it would have been proper to attach

such a condition to the issuance of a building permit only if there had been a close nexus between the easement condition and the cure of an adverse impact of the project. The actual condition imposed was improper because it singled out the Nollans and required them to provide a benefit which should have been provided by the public as a whole.

The decision at bar continues a pattern in Washington takings decisions which refuse to apply the *Nollan* nexus analysis to the review of development fees.

The problem with the Washington Supreme Court's application of the *Nollan* substantial advancement/nexus test is quite apparent in *Sintra v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765 (1992). The case involved a Seattle ordinance which required property owners, as a condition of converting low income housing units to another use, either to build replacement units or to pay a substantial fee for replacement of such housing. Although the court in *Sintra* had concluded that the exaction at issue was a blatant attempt to shift the social cost of homelessness to a discrete segment of property owners, the court nevertheless held that *Nollan's* nexus analysis did not apply. Ignoring *Nollan*, *Sintra* did not analyze whether the means of advancing the City's legitimate objective of providing low-cost housing by shifting responsibility to fund such housing to a small portion of the population was proper. The court in *Sintra* erroneously stated that *Nollan's* analysis only applies when a physical invasion is involved. *Sintra*, 829 P.2d 765, 773, n.7. *Sintra* concluded that the exaction would not effect a taking because the money raised substantially advanced legitimate state interests. 829 P.2d at 774.

Contrary to the Washington Supreme Court's approach, there is no basis for characterizing *Nollan* as a physical invasion case.[2] A noted commentator on takings law stated:

> The Supreme Court decision in *Yee*, issued six weeks prior to *Sintra*, expressly rejected the notion that *Nollan* was a physical invasion case or that its principles were limited to a physical invasion context. In *Yee*, the property owners attempted to characterize a rent-control provision as working a physical invasion taking. The Supreme Court explained that the rent control provision did not result in a taking by physical occupation, but instead suggested that the ordinance should have been analyzed as a potential regulatory taking. Citing *Nollan*, the Court explained that the rent control ordinance may cause 'a regulatory taking' depending on 'whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.' This inquiry under *Nollan* 'has nothing to do with whether the ordinance causes a physical taking.'

J. Groen, R. Stephens, *Takings, Lucas and the Growth Management Act*, 16 U. Puget Sound L.Rev. 1259 (1993).[3]

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[2] The example which this Court utilized in *Nollan* to exemplify an improper development condition, e.g., payment of a fee to be allowed to shout "fire" in a crowded theater in violation of a regulation prohibiting such conduct was an exaction requiring payment of a fee. See e.g., *Nollan*, 483 U.S. at 837.

[3] The article by J. Groen, R. Stephens, *Takings, Lucas And The Growth Management Act*, will soon be published in Volume 16 of the U. Puget Sound Law Review. The pagination indicated above could change upon publication.

Although the exaction in *Nollan* involved an easement over land, *Yee* makes it clear that *Nollan's* substantial advancement/nexus analysis is based on constitutional principles that do not change because the government demands money rather than land. *Nollan* notes that its approach to the analysis of exactions "is consistent with the approach taken by every other court that has analyzed this question with the exception of the California state courts" and cites 23 cases from various U.S. jurisdictions dealing with exactions. *Nollan, supra* at 839. Nine of the cases cited by *Nollan* deal with exactions which require payment of a fee.[4]

Robinson v. Seattle, 119 Wash. 2d 34, 830 P.2d 318, cert. denied, 121 L.Ed.2d 598, 113 S.Ct. 676 (1992) also declined to apply the *Agins/Nollan* substantial advancement test to evaluate a development condition which required individuals tearing down low-cost housing to make a payment into the City's Housing Replacement Fund (the same ordinance which was at issue in *Sintra*). *Robinson* concluded that there was no taking because the property owners had not been denied *all* use of their property,

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[4] *J.E.D. Associates Inc. v. Town of Atkinson,* 121 N.H. 581, 432 A.2d 12 (1981); *Briar West v. Lincoln,* 206 Neb. 172, 291 N.W.2d 730 (1980); *State ex rel. Noland v. St. Louis County,* 478 S.W.2d 363 (Mo. 1972); *Longbridge Builders v. Planning Bd. of Princeton,* 52 N.J. 348, 245 A.2d 336 (1968); *Jordan v. Menomonee Falls,* 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dism'd, 385 U.S. 4 (1966); *College Station v. Turtle Rock Corp.,* 680 S.W.2d 802 (Tex., 1984); *Collis v. City of Bloomington,* 310 Minn. 5, 246 N.W.2d 19 (1976); *Longboat Key v. Lands End., Ltd.,* 433 So.2d 574 (Fla. App. 1983); *Jenad, Inc. v. Scarsdale,* 18 N.Y.2d 78, 218 N.E.2d 673 (1966).

totally disregarding the *Nollan* substantial advancement/ nexus test. Mr. Groen states:

> . . . Specifically, despite what should have been a clear application of *Nollan*, the *Robinson* decision held that there was no facial taking because the property owners were not denied all use of the property. The problem with this analysis is that it ignores the *Nollan* basis for a taking. The United States Supreme Court has stated that whether there has been a denial of all economic use is irrelevant to the substantial advancement test applied in *Nollan*. For example, in *Nollan*, the owners were not denied all use of their land; the Nollans received their building permit. But this had no effect on the analysis of the impropriety of the condition attached to the permit. Likewise, in *Yee v. Escondido*, the Court stated that whether a regulation meets the substantial advancement test 'does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property.'

J. Groen, *supra* at 1298.

The Washington Supreme Court, in the case at bar, again overlooked the obvious application of *Nollan* principles and thus failed to apply properly its substantial advancement/nexus test. *Guimont* simply reasoned that the money raised would be used for addressing a legitimate government concern, and, therefore, substantially advanced a legitimate state interest. Missing entirely from the analysis is the "essential nexus" requirement spelled out by this Court in *Nollan*.

Nollan clearly requires consideration of both the means and end of a regulation to determine whether an exaction is a legitimate exercise of regulatory power. *Guimont* only examined the objective of the relocation fee statute. It failed to consider whether the means used to attain the legitimate state objective were proper. *Guimont* did not analyze (1) whether the financial assistance requirement imposed on mobile park owners was a condition which mitigated an adverse impact of the park owners' development proposal, and (2) whether the State should have singled out park owners to bear the social burden of providing financial aid to displaced mobile home tenants.

When *Guimont* concluded that the relocation fee statute was not a taking, it disregarded the fact that a paramount concern of this Court, expressed in its taking clause decisions in *Armstrong* and *Nollan*, is with land use regulations which go too far and impose the burden of achieving public objectives on a few individuals rather than society as a whole.

Guimont stated that the means utilized by the relocation fee statute were oppressive:

> An individual park owner who desires to close a park is not significantly more responsible for those general society wide problems than is the rest of the population.

Guimont, 854 P.2d at 15.

Guimont also noted:

> Yet by requiring the closing park owner to pay the costs which can amount to extremely high sums of money, the State is placing the burden

> of solving housing problems on the shoulders of a few.

Id.

Remarkably, however, the Washington Supreme Court in *Guimont* neglected to discern, that its concern that a few individuals should not bear financial responsibility for social problems, mirrors the concern expressed by this Court in *Nollan*, and was one of the reasons this Court concluded that the exaction at issue in *Nollan* was a taking. Mr. Groen states:

> Significantly the analysis in *Sintra* and *Robinson* [this article was written before *Guimont*] parallels the concerns expressed in *Nollan* . . . in the same manner, in *Sintra* and *Robinson* providing low income housing was a proper objective for a government to pursue – the problem was the lack of legitimate regulatory justification for imposing the remedy on land owners. Under *Nollan*, using the permitting authority to shift such costs is a taking.

J. Groen, *supra* at 1839.

III. Accepting Review of the Takings Issue in *Guimont* Would Complement This Court's Review of *Dolan v. Tigard*, a Case Which This Court Has Recently Decided to Review.

Dolan v. Tigard, 317 Or. 110, 854 P.2d 437 (1993) addressed the constitutionality of exactions which required a property owner constructing a building to provide land for a bicycle/pedestrian path easement, and a floodplain area for public storm water control. In *Dolan*, this Court will review the nexus analysis. In particular,

the Court will clarify whether there need be a precise match or fit between the imposition of development conditions and the mitigation of adverse impacts or whether only a loose, tenuous relationship, which can be rationally justified, will suffice.

Accepting review of the takings issue in *Guimont* would allow this Court to affirm that the nexus analysis set forth in *Nollan* applies to development exactions when the item demanded by government is money, rather than real property.

IV. This Court Should Accept Review of the Takings Issue in Guimont Because the Washington Supreme Court's Threshold Analysis has Resulted in Abridgement of the Protection Afforded to Washington Citizens by the Just Compensation Clause of the Fifth Amendment.

The decision of the Washington Supreme Court to review land use regulations involving unconstitutional exactions in cases such as *Guimont*, *Sintra* and *Robinson* under a substantive due process analysis, rather than invoking the takings analysis to avoid having a "chilling effect"[5] on legislative bodies, has significantly reduced the Fifth Amendment protection available to Washington citizens. Washington citizens, like other United States citizens, are entitled to full protection of the Takings Clause and to just compensation if the government takes their property for a public purpose.

It would be appropriate for this Court to review the constitutionality of Washington's takings analysis if the

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[5] *Sintra*, 829 P.2d 765, 772.

Court decides to review substantive due process claims raised in the State's Petition.

VI. CONCLUSION

This Court has before it the Petition of the State which raises the question of whether undue oppressiveness is part of the analysis of a substantive due process claim. If this Court accepts review of the State's Petition and rules that undue oppressiveness is not a component of the substantive due process analysis, this Court should grant review of this Cross-Petition and consider whether undue oppressiveness is part of the analysis of takings claims. The only way to have that issue before the Court is to grant the Cross-Petition of Respondent. This Cross-Petition would also give this Court the opportunity to clarify that the *Nollan* nexus analysis applies to development fee exactions.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT PATRICK GUIMONT, ET AL., *Cross-Petitioners*,

v.

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT, *Cross-Respondent*.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a land use regulation, that substantially advances a legitimate state interest and does not deny the owner all economic use of the property or result in a physical invasion, may nevertheless be invalidated under the Takings Clause based on a non-fact specific facial claim that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public.

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STATEMENT

This case involves a challenge to the Mobile Home Relocation Assistance Act (the "Act") passed by the Washington Legislature to address the state-wide problem of relocation expenses associated with the closing of mobile home parks. The Washington Supreme Court ruled the Act violated substantive due process. The State of Washington through the Director of the Washington Department of Community Development has petitioned for a writ of certiorari seeking review of this ruling. The Washington Supreme Court also ruled that the Act was not unconstitutional under the Takings Clause. The cross-petition filed by Guimont and the other Cross-Petitioners seeks review of the takings ruling.

The basic facts about the operation of the Act and the procedural history of this case are set forth in the State's petition. Pet. 3-9. Of particular significance is the fact that this action involves a facial challenge to the validity of the Act. Guimont did not seek compensation for any alleged taking. Guimont sought only to invalidate the Act.

Indeed, Guimont did not challenge the application of the Act to any particular piece of property. *Guimont v. Clarke*, 121 Wash. 2d 586, 606, 854 P.2d 1 (1993). Pet. A-26. In this respect, the statement of the case in the cross-petition is potentially misleading. In it Guimont dwells on the experience of one of the intervenors, Bear Creek Associates. Res. Br. Opp. at 1-2.[1] However, this case does not concern the application of the Act to any specific piece of property, including that of Bear Creek.[2] This case presents solely a facial challenge to the Act.

ARGUMENT

The Washington Supreme Court has worked hard to develop a set of rules to reconcile the application of substantive

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[1] The statement of the case in Guimont's cross-petition incorporates the counter statement of facts contained in Guimont's Brief in Opposition. Cross-Pet. 3.

[2] In addition to intervening in this action, Bear Creek brought a separate action alleging that the Act was unconstitutional. *Bear Creek Assoc. v. Department of Community Dev.*, Thurston County Superior Court, Docket No. 91-2-00061-9. At this point, it is not clear whether Bear Creek's action represents a facial or "as applied" challenge to the Act. However, Bear Creek's intervention in this case did not change the facial challenge raised by Guimont.

due process and takings in the land use context.[3] Since the Washington Supreme Court has developed these doctrines together, Guimont argues that this Court should grant the cross-petition regarding takings, if it grants the State's petition regarding substantive due process. Cross-Pet. at 4-5. We agree. As we noted in the State's petition, there is significant confusion regarding the relationship between substantive due process and takings in the land use context. Pet. 22-25. This case presents the Court with an ideal vehicle to resolve this confusion and both the state and federal courts would benefit if this Court explained the relationship between these two doctrines.

While we agree that it would be appropriate to grant both petitions to resolve the confusion regarding the relationship between substantive due process and takings, we do not believe that the Questions Presented by Guimont have any particular

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[3] *See Orion Corp. v. State*, 109 Wash. 2d 621, 747 P.2d 1062, *cert. denied*, 486 U.S. 1022 (1988); *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990); *Sintra, Inc. v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, 113 S. Ct. 676 (1992); *Robinson v. Seattle*, 119 Wash. 2d 34, 830 P.2d 318, *cert. denied* 113 S. Ct. 676 (1992); and *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993).

significance in and of themselves. The Washington Supreme Court was correct in ruling that there is no taking in this case. The court below properly applied the takings decisions of this Court in analyzing the facial challenge to the Act.

1. The Washington Supreme Court Correctly Concluded That the Mobile Home Relocation Assistance Act is Not a Taking

The precedents of this Court establish two distinct classes of takings analysis. The first is physical occupation of the property. "Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation." *Yee v. City of Escondido*, 503 U.S.___, 112 S. Ct. 1522, 1526 (1992). The second is a regulatory taking. The regulation of property may require compensation depending on "complex factual assessments of the purposes and economic effects of government actions." *Id.*

The complex factual assessment required for a regulatory taking claim may be avoided to some extent if the property owner makes only a facial challenge that presents no concrete controversy concerning the application of the law to any

particular piece of property. "The test to be applied in considering [a] facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land[.]'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). A facial challenge to an alleged regulatory taking can apparently also be based on the claim that "the ordinance does not 'substantially advance' a 'legitimate state interest' no matter how it is applied." *Yee*, 112 S. Ct. at 1532.

In this case the Washington Supreme Court concluded there was no physical or regulatory taking. First, there was no physical invasion of Guimont's property. "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 1528 (emphasis by the Court). The Washington Supreme Court correctly concluded that the Act imposes no such requirement because park owners have the right to voluntarily rent space and

to terminate the rental relationship. *Guimont v. Clarke*, 121 Wash. 2d at 608. Pet. A-29-30.

Second, Guimont's regulatory taking claim raised only a facial challenge. There was no regulatory taking because Guimont made no attempt to prove the Act denied the park owners all economically viable use of their property. *Id.* at 606. Pet. A-26. The Washington Supreme Court also correctly rejected Guimont's claim that the Act does not substantially advance legitimate state interests. The court said: "The State has a legitimate interest in addressing the statewide problem of relocation expenses associated with mobile home park closings. Making funds available to mobile home owners who are forced to relocate substantially advances that interest." *Id.* at 606 n.8. Pet. A-26.

Guimont claims that the court's analysis of this final point is inconsistent with the analysis in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Cross-Pet. 11-13. Guimont's argument is flawed because it misstates the basis of the Court's decision in *Nollan*. According to Guimont:

> This Court, in *Nollan*, recognized that the Coastal Commission had a *legitimate objective of providing greater public access along the beach* and that acquisition of more access furthered it. The means of acquisition employed, however, were improper. . . . The actual condition imposed was improper because it singled out the Nollans and required them to provide a benefit which should have been provided by the public as a whole.

Cross-Pet. 7-8 (emphasis added).

This was not the basis of the Court's decision in *Nollan*. Contrary to Guimont's assertion, in *Nollan* the state asserted that it had a legitimate state interest in "*protecting the public's ability to see the beach*, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront[.]" *Nollan*, 483 U.S. at 835 (emphasis added). However, the restriction imposed by the state required *access* to the beach rather than a *view* of the beach. Thus, the Majority concluded that it was "impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838.

The problem in *Nollan* was that the "condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. If the condition in *Nollan* had dealt with view rather than access, the Court likely would have concluded that there was no taking.[4]

In this case, unlike *Nollan*, there is a direct relationship between the closing of a mobile home park and the payment of relocation assistance to displaced homeowners. Guimont is simply wrong in asserting that *Nollan* established a test to determine whether a property owner is being singled out to provide a benefit that should be provided by the public as a

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[4] According to the Court in *Nollan*:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house–for example, a height limitation, a width restriction, or a ban on fences–so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional.

483 U.S. at 836.

whole. Indeed, the Court in *Nollan* specifically recognized that this was not the basis of the landowner's challenge.[5]

Of course, a property owner can raise a takings claim based on the allegation that a regulation unfairly singles out the land owner to bear a burden that should be borne by the public. However, such a claim must be raised in an "as applied" challenge that concerns a specific piece of property. As the Court said in *Yee*:

> But where the government merely regulates the use of property, compensation is required *only if considerations* such as the purpose of the regulation or the extent to which it deprives the

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[5] The Court said:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *But that is not the basis of the Nollans' challenge here.*

Id. at 835 n.4 (emphasis added, citations omitted).

> owner of the economic use of the property *suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. . . . [This] necessarily entails complex factual assessments* of the purposes and economic effects of government actions.

Yee, 112 S. Ct. at 1526 (emphasis added, citations omitted). In a facial challenge, such as the case at bar, it is simply not possible to conduct the "complex factual assessments" required to determine whether an individual landowner has been unfairly singled out. *Nollan* does not so hold.

2. This Court Should Grant Both the State's Petition and Guimont's Cross-Petition to Clarify the Relationship Between Takings and Substantive Due Process

Although the Washington Supreme Court was correct in concluding the Act does not result in a taking, we urge the Court to grant both the State's petition and Guimont's cross-petition. In the State's petition, we seek review of the unduly oppressive standard applied by the Washington Supreme Court in its substantive due process analysis. In raising the takings issue, the cross-petition offers the Court the opportunity to clarify how the test for substantive due process relates to the requirement of the

Takings Clause that a land use regulation substantially advance a legitimate state interest.

As we noted in the State's petition, there is substantial confusion regarding the relationship between substantive due process and takings. Pet. at 22-25. This confusion revolves around a number of unanswered questions.

First, is the test for substantive due process the same as the Takings Clause requirement that a land use regulation substantially advance a legitimate state interest? Speaking for the Majority in *Nollan*, Justice Scalia indicates that the tests are different. ("Contrary to Justice Brennan's claim . . . our opinions do not establish that these standards [substantially advance a legitimate state interest] are the same as those applied to due process or equal protection claims." *Nollan*, 483 U.S. at 834 n.3.) In his dissenting opinion Justice Brennan disagreed. ("Not withstanding the suggestion otherwise . . . our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one." *Id.* at 843 n.1.) In *Concrete Pipe & Prod. of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. ___, 113 S. Ct. 2264

(1993), the Court seems to say that the tests are the same or at least very similar. ("Given that Concrete Pipe's due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause." *Id.* at 2289, quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).)

Second, can the Takings Clause be used to invalidate a land use regulation when the landowner does not seek compensation? A regulation that violates substantive due process is unconstitutional and unenforceable. It is not clear whether this is also true of the Takings Clause. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), suggests that the Takings Clause applies to determine whether compensation is necessary. ("[The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Id.* at 314.) On the other hand, *Yee* seems to say that even if there is compensation, a regulation may be struck down if it does not substantially advance a legitimate state interest. ("As *this allegation does not depend on* the extent to which petitioners are

deprived of the economic use of their property or *the extent to which these particular petitioners are compensated*, petitioners' facial challenge is ripe." *Yee*, 112 S. Ct. at 1532.) This question is directly relevant here since Guimont does not seek compensation. Guimont only seeks to invalidate the Act.

Finally, there is an additional question relating to remedy for violations of substantive due process and the Takings Clause. If a land use regulation violates substantive due process it is invalid. If the regulation violates the Takings Clause the government appears to have the option of paying compensation and "taking" the property. ("Once a court determines that a taking has occurred, the government retains the whole range of options already available–amendment of the regulation, withdrawal of the invalidated regulation, or [the] exercise of eminent domain." *First Lutheran Church*, 482 U.S. at 321.) Thus, in *Nollan* the State could have compensated the landowner in order to obtain access to the beach. Yet how can the government exercise its eminent domain power under the Takings Clause if the land use regulation also violates substantive due process?

The Washington Supreme Court and other courts have long struggled with these questions. They are important and complex. This Court can resolve these questions in this case. It presents an ideal vehicle because this case is essentially a simple one. It is a facial challenge to a statute and does not involve a complex factual record. It offers the Court the opportunity to establish a baseline for its substantive due process and takings analysis.

CONCLUSION

For the reasons stated above, the Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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